UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

ALTERNATIVE COMMUNITY LIVING, INC.
d/b/a NEW PASSAGES BEHAVIORAL HEALTH
AND REHABILITATION SERVICES

Respondent

and Case 07-CA-158059

LOCAL 517M, SERVICE EMPLOYEES
INTERNATIONAL UNION (SEIU)

Charging Party

COUNSEL FOR THE GENERAL COUNSEL'S
BRIEF TO THE ADMINISTRATIVE LAW JUDGE

Counsel for the General Counsel Eric S. Cockrell respectfully submits this brief to Administrative Law Judge (ALJ) Christine Dibble, who, on June 20, 2016, granted a joint motion for this case to be submitted by stipulated record directly to the ALJ. On June 30, Respondent, the Charging Party, and Counsel for the General Counsel submitted a joint stipulation of facts to the ALJ. On the same date, the ALJ granted the joint motion waiving a hearing, approving the stipulation of facts and exhibits comprising the record to date, and scheduling July 29, 2016 as the due date for the filing of briefs.

I. ISSUES PRESENTED

1. Whether Respondent's monetary payments of the unilaterally implemented 2013 – 2014 collective bargaining agreement (CBA) (J-2) constitute a term and condition of employment and a benefit granted?

   Counsel for the General Counsel answers in the affirmative.

2. Whether Respondent was privileged not to pay the Monetary Payment scheduled for July 1, 2015, by the March 31, 2015, Board Decision and Order. (GC-2)

Counsel for the General Counsel answers in the negative.

3. Whether Respondent's failure to pay to bargaining unit employees the July 1, 2015, Monetary Payment was an unlawful unilateral change in violation of Section 8(a)(1) and (5) of the Act.

Counsel for the General Counsel answers in the affirmative.

4. Whether Respondent's failure to pay to bargaining unit employees the July 1, 2015, Monetary Payment, in response to the March 31, 2015, Board Decision and Order (GC-2) was, in itself, an unlawful unilateral unilateral change in violation of Section 8(a)(1) and (5) of the Act.

Counsel for the General Counsel answers in the affirmative.

5. Whether Respondent violated paragraph 2(b) of the March 31, 2015, Board Decision and Order (GC-2) by failing to pay the July 1, 2015, Monetary Payment to bargaining unit employees.

Counsel for the General Counsel answers in the affirmative.

II. FACTS AS STIPULATED

1. Since 2006, the Charging Party has represented about 315 employees in the unit set forth below at Respondent's about 30 group homes located within the State of Michigan.

   The appropriate bargaining unit is:

   All full-time and regularly scheduled part-time direct care workers and case managers employed by the Respondent in its various group homes located in Bay, Saginaw, Clinton, Eaton, Ingham, Jackson, Washtenaw, Oakland, Macomb, Lapeer, Livingston, and Sanilac counties in the State of Michigan, but excluding all line managers, targeted case managers, directors, human resource personnel, nurses, administration assistants, and guards and supervisors as defined in the Act and all other employees.

2. The parties' executed 2009 – 2011 collective bargaining agreement (2009-2011 CBA) (J-1, p.10) provides:

> ARTICLE ?
> ONE-TIME MONETARY PAYMENT
> Upon ratification all bargaining unit employees will receive a one time monetary payment no later than two pay periods after the ratification of the contract.
> The one time monetary payment schedule shall be as follows:
> Employees with 5 years of service or less counting backward from the date of ratification $150.00
> Employees with +5 years of service counting backward from the date of ratification:
> $200.00

3. Per the above 2009-2011 CBA, Article (J-1, p. 10), in about early 2010, Respondent paid a one-time ratification Monetary Payment to unit employees upon ratification of the 2009-2011 CBA (J-1).

4. On May 5, 2013, Respondent declared impasse and implemented its last best and final offer in the form of a 2013-2016 CBA with effective dates of May 5, 2013 to November 30, 2016 (J-2), the implementation of which became the subject of Case 07-CA-099976.

5. On March 31, 2015, the National Labor Relations Board issued a Decision and Order in ***Alternative Community Living, Inc. d/b/a New Passages Behavioral Health and Rehabilitation Services***, 362 NLRB No. 55 (2015) (Case 07-CA-099976) (GC-2) (referred to hereafter as New Passages I) finding that Respondent violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act) by unilaterally implementing its final offer (J-2) at a time when the parties had not reached a valid
impasse.

Paragraph 2(b) of the Board Decision and Order (GC-2) provides, in its entirety:

> Restore to the unit employees the terms and conditions of employment that were applicable prior to May 5, 2013, and continue them in effect until the parties reach either an agreement or a valid impasse in bargaining. Nothing herein shall require the rescission of any ratification bonus or other benefits granted after May 5, 2013.

6. Respondent's unilaterally implemented 2013-2016 CBA on pages 12-13 (J-2) provided as follows:

ARTICLE _____[1] - MONETARY PAYMENTS

Upon ratification all bargaining unit employees will receive a monetary payment no later than two pay periods after the ratification of the contract. These payments will be paid in a separate paycheck.

The monetary payment schedule shall be as follows after ratification:

First Payment:

Employees with 5 years of service or less counting backward from the date of ratification: $100.00

Employees with 5 years of service or more counting backward from the date of ratification: $110.00

Second Payment:

Employees will have the following monetary payment no later than two pay periods after the following date[:] July 1, 2014:

Employees with 5 years of service or less counting backward from July 1, 2014, will receive the following amount[:] $105.00

Employees with 5 years of service or more counting backward from July 1, 2014, will receive the following amount[:] $120.00

Third Payment:

Employees will have the following monetary payment no later than two pay periods after the following date[:] July 1, 2015:

Employees with 5 years of service or less counting backward from July 1, 2015, will receive the following amount[:] $110.00

Employees with 5 years of service o[r] more counting backward

[1] The unilaterally implemented 2013-2016 CBA (J-2) does not have Article numbers.

from July 1, 2015, will receive the following amount[:] $125.00

7. On or about July 1, 2013, Respondent paid unit employees pursuant to the unilaterally implemented 2013-2016 CBA, ARTICLE __ MONETARY PAYMENTS (J-2, pp. 12-13) as follows:

   First payment:
   Employees with 5 years of service or less counting backward from the date of ratification: $100.00

   Employees with 5 years of service or more counting backward from the date of ratification: $110.00

8. On or about July 1, 2014, Respondent paid unit employees pursuant to the unilaterally implemented 2013-2016 CBA, ARTICLE__ MONETARY PAYMENTS (J-2, pp. 12-13) as follows:

   Second payment:
   Employees with 5 years of service or less counting backward from July 2014: $105.00

   Employees with 5 years of service or more counting backward from July 1, 2014: $120.00

9. On about July 1, 2015, Respondent **did not** pay unit employees pursuant to the unilaterally implemented 2013-2016 CBA, ARTICLE_MONETARY PAYMENTS (J-2), pp. 12-13), whatsoever.

III. ARGUMENT

Respondent's failure to pay the July 1, 2015 installment of its ratification bonus constitutes a unilateral change in violation of Section 8(a)(5) of the Act.

The Board's standard remedy for an employer's unilateral change is restoration of the status quo ante with respect to employees' terms and conditions of employment, "conditioned upon the affirmative desire of the affected employees for such, as expressed through their collective bargaining representative." ***Herman Sausage Co.***, 122 NLRB 168, 173 (1958), *enfd*. 275 F.2d 229 (5th Cir. 1960).

Also, when a unilateral change benefits employees, the Board does not require rescission except at the request of the bargaining representative. ***Fresno Bee***, 339 NLRB 1214, 1216 n.6 (ordering rescission of employer's unilateral changes that were unilateral rescissions of earlier unlawful changes, but noting "[b]ecause some of the Respondent's unilateral changes may be perceived as beneficial to employees, we will *order the rescission of these changes only at the request of the Union*" emphasis added); ***CJC Holdings***, 320 NLRB 1041, 1047 (1996) (adopting ALJ order requiring employer to restore status quo but maintain unilaterally implemented wage increases unless the union requested rescission), *enforced mem.* 110 F.3d 794 (5th Cir. 1997); ***Koenig Iron Works***, 282 NLRB 717, 719 (1987) (Board order "*should not be construed as requiring the Respondent to cancel any wage increase or other improvement in benefits without a request from the Union*"), *reversed on other grounds*, 856 F.2d 1 (2d Cir. 1988).

In addition, the Board has held that an employer further violates Section 8(a)(5) by unilaterally discontinuing a bonus plan benefit in response to a Board order restoring the status quo, thereby rejecting the employer's affirmative defense that a Board order in an underlying unfair labor practice proceeding obligated it to discontinue the extra-contractual bonus. ***Mining Specialists*** ("***Mining Specialists III***"), 335 NLRB 1275 (2001), *enfd*, 326 F.3d 602 (4th Cir. 2003). *In New Passages I (GC-2), the Board found, inter alia, that Respondent violated Section 8(a)(5) of the Act by violating its collective bargaining agreement with the Charging Party*. Similarly, in ***Mining Specialists***, during the pendency of the initial litigation, the respondent established a production bonus plan, but unilaterally discontinued it a few months later after the Board ordered the respondent to comply with the parties' agreement and make the employees whole for its failure to apply the contractual terms and conditions. ***Mining Specialists III***, 335 NLRB at 1277. In the subsequent unfair labor practice proceeding, the respondent argued that the Board's order required it to discontinue the bonus plan because it had not followed contractual procedures in establishing the plan. The Board disagreed, and held that under the terms of the original Board order, the respondent was obligated to make employees whole for the discontinued bonus. ***Mining Specialists III***, supra.

Consistent with its longstanding remedial policy, the Board in the underlying unfair labor practice case here ordered Respondent to rescind its unlawfully implemented successor agreement, but noted that the order should not

be construed to require the rescission "of any ratification bonus or other benefits granted after May 5, 2013." (emphasis added) (GC-2, p. 21, ¶ 2(b)) Accordingly, the only outstanding issue is whether the third and final installment of the "ARTICLE_____ -MONETARY PAYMENTS" ratification bonus was a benefit granted after May 5, 2013. (J-2, pp. 12-13). Based on the evidence contained in the stipulated record, and extant case law, Counsel for the General Counsel asserts that such a bonus was, in fact, a benefit granted after May 5, 2013. Consequently, Respondent's failure to pay the third and final installment to employees constitutes an unlawful unilateral change.

The ratification bonus was "granted' at the time that it was announced, even though it was not paid. Well-established Board law provides that a unilateral change is unlawful from the time that it is announced even if the change is not yet implemented. ***ABC Automotive Products Corp.***, 307 NLRB 248, 249-50 (1992) (employer made unlawful unilateral change where new health benefits were announced even though never implemented because striking employees never returned to work; "such an announcement would cause a reasonable employee to assume that . . . a condition of employment would have changed . . . .[T]he unilateral change was effectively implemented when it was announced"), *enforced mem.* 986 F.2d 500 (2d Cir. 1992); citing ***Century Wine & Spirits***, 304 NLRB 338, 347 (1991); ***Kurdziel Iron of Wauseon***, 327 NLRB 155, 155-56 (1998) (finding 8(a)(5) violation where "[e]ven if the announced reduction [in break time] did not finally result in the actual curtailment of employees' breaks,

the damage to the bargaining relationship was accomplished"), *enforced mem*. 208 F.3d 214 (6th Cir. 2000); ***CJC Holdings***, supra at 1041 n.2 (finding 8(a)(5) violation where employer announced intent to change employees' dental insurance; "the promise itself, even if not immediately carried out, changed the terms and conditions of employment"). In such circumstances, the announcement itself conveys the message that the employer is unilaterally altering a term or condition without the union's input. ***ABC Automotive Product***, supra at 250. Compare with ***Eagle Transport Corp.***, 338 NLRB 489, 489 (2002) (no violation where employer's announced shift change was cancelled after the union objected and before implementation; reasonable employee would not have understood that announced change had been "effectively implemented"). By extension, the unilateral bonus here should be deemed "granted" as of the unlawful implementation of Respondent's last best and final offer. The bonus was part and parcel of Respondent's unlawfully implemented agreement.

Moreover, even accepting, *arguendo*, that Respondent had not "granted" the bonus at the time of implementation, because it was styled as a ratification bonus and the employees did not ratify the agreement, Respondent certainly granted the bonus by paying the first installment in July 2013, and that grant was confirmed by the payment of the second installment in July 2014. Therefore, Respondent was lawfully obligated to pay the final installment scheduled for July 2015 of the benefit granted. (J-2, pp. 12-13)

IV. CONCLUSION

For the reasons stated in this brief, Counsel for the General Counsel respectfully requests that the ALJ find that Respondent violated the Act as averred and order it to take the remedial actions outlined in Appendix A.

Dated at Detroit, Michigan, this 29th day of July 2016.

/s/ Eric S. Cockrell

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CERTIFICATE OF SERVICE

I certify that on the 29th day of July 2016, I served copies of the Counsel for the General Counsel's Brief to the Administrative Law Judge on the following parties of record electronically:

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/s/ Eric S. Cockrell

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Eric S. Cockrell
Counsel for the General Counsel

APPENDIX A

PROPOSED NOTICE TO EMLOYEES

(To be printed and posted on official Board notice form)

SECTION 7 OF THE NATIONAL LABOR RELATONS BOARD, A FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT fail to pay you the third and final installment of a bonus.

WE WILL NOT fail and refuse to bargain collectively and in good faith with Local 517M, Service Employees International Union (SEIU) as the exclusive collective-bargaining representative of our employees in the following appropriate Unit at our Michigan facilities:

> All full-time and regularly scheduled part-time direct care workers and case managers employed by the Respondent in its various group homes located in Bay, Saginaw, Clinton, Eaton, Ingham, Jackson, Washtenaw, Oakland, Macomb, Lapeer, Livingston, and Sanilac counties in the State of Michigan but excluding all line managers, targeted case managers, directors, human resource personnel, nurses, administration assistants, and guards and supervisors as defined in the Act and all other employees.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL NOT in any like or related manner fail and refuse to bargain collectively and in good faith with the Union as the exclusive collective bargaining representative of our employees in the Unit at our Michigan facilities.

WE WILL make whole all Unit employees whose bonuses were withheld on about July 1, 2015, with interest computed in accordance with Board policy.

WE WILL, upon request, bargain collectively and in good faith with the Union as the exclusive collective-bargaining representative of our employees in the Unit at our Michigan facilities.

ALTERNATIVE COMMUNITY LIVING, INC. d/b/a NEW PASSAGES BEHAVIORAL HEALTH AND REHABILITATION SERVICES

(Employer)

Dated _____ **By:** _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret-ballot elections to determine whether employees want union representation and we investigate and remedy unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below or you may call the Board's toll-free number 1-866-667-NLRB (1-866-667-6572). Hearing impaired persons may contact the Agency's TTY service at 1-866-315-NLRB. You may also obtain information from the Board's website: www.nlrb.gov.

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